# 92-301

Supreme Court, U.S.
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No. 92-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

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THE STATE OF TEXAS,
*Petitioner,*

v.

ROBERT LYNN JIMENEZ,
*Respondent.*

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**Petition for Writ of Certiorari to the Court of Appeals for the Eighth District of Texas**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Texas penal statute which prohibits the destruction of the flag of the United States violate the First Amendment of the Constitution?

2. Should this Court grant certiorari to review its prior decisions holding that flag desecration is protected by the First Amendment?

## LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner, the State of Texas, and defendant below and the respondent to this petition, Robert Lynn Jimenez. In addition, Timothy Dale Holt and Stephan Richard Pyles were charged in separate criminal informations with the same offense as respondent.

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THE STATE OF TEXAS,
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ROBERT LYNN JIMENEZ,
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**Petition for Writ of Certiorari to the Court of Appeals for the Eighth District of Texas**

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner, the State of Texas, requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth District of Texas entered in this proceeding on March 4, 1992. The Court of Criminal Appeals of Texas refused discretionary review on June 3, 1992. Such refusal of discretionary review became final on June 18, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth District of Texas is reported at 828 S.W.2d 455 [*State v. Jimenez*, 828 S.W.2d 455 (Tex.App.-El Paso 1992, pet. ref'd)], and is set out at pages 1a through 4a of the

appendix. The order of the Texas Court of Criminal Appeals is not reported, but is set out on page 7a of the appendix. The order of the County Court of Midland County, Texas, declaring the Texas flag destruction statute unconstitutional is not reported, but is set out on pages 5a through 6a of the appendix.

## JURISDICTION

The opinion of the Court of Appeals for the Eighth District of Texas was entered on March 4, 1992. The Texas Court of Criminal Appeals, the state court of last resort, refused discretionary review on June 3, 1992. The refusal of discretionary review became final on June 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution and the Texas Penal Code, which are provided in relevant part.

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Texas Penal Code, Section 42.14:

> A person commits an offense if the person intentionally or knowingly damages, defaces, multilates, or burns the flag of the United States or the State of Texas.

## STATEMENT OF THE CASE

In *Texas v. Johnson*, 491 U.S. 397 (1989), this Court, in a 5-4 vote, held that the Texas penal statute which prohibited desecration of venerated objects, in the case of the burning of an American flag, violated the First Amendment. As a result, the Texas Legislature passed a new penal statute, Section 42.14 of the Texas Penal Code, which made it an offense for any person to dam-

age, deface, burn, or otherwise mutilate the United States or Texas flag. This penal provision was effective September 1, 1989. Shortly thereafter, Congress enacted the Flag Protection Act of 1989. In *United States v. Eichman*, 496 U.S. —— (1990), the same majority of this Court held that the Flag Protection Act of 1989 violated the First Amendment.

On February 23, 1990, respondent was arrested by officers of the Midland Police Department for violation of Section 42.14 of the Texas Penal Code. The officers found respondent and two others in possession of two United States flags and two Texas flags. These flags had been defaced by having various obscenities and satanic symbols written and printed thereon. Respondent was thereafter charged by criminal information for intentionally and knowingly damaging, defacing, and mutilating these flags in violation of Section 42.14. Respondent filed a motion to have the Texas statute declared unconstitutional as violative of the First Amendment, relying upon this Court's decisions in *Johnson* and *Eichman*. The trial court, also relying upon *Johnson* and *Eichman*, agreed with respondent and held that Section 42.14 of the Texas Penal Code violated the First Amendment. The State appealed the trial court's holding to the Court of Appeals for the Eighth District of Texas. The Court of Appeals affirmed the trial court, again relying on *Johnson* and *Eichman*. The Texas Court of Criminal Appeals thereafter refused discretionary review.

## REASON FOR GRANTING THE WRIT

Petitioner recognizes the apparent controlling effect of this Court's decisions in *Johnson* and *Eichman* in this case. However, as noted by the Court of Appeals in its opinion, both *Johnson* and *Eichman* were decided by a sharply divided, narrow majority, of this Court. While the easiest course might be to simply apply the doctrine of *stare decisis* and affirm the Court of Appeals, petitioner submits that such doctrine in and of itself should not support bad national policy. This Court has noted that:

> stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and vertified by experience.

*Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Indeed, such a fact was recognized in the dissenting opinion of Mr. Justice Stevens, in which the Chief Justice, Justice White, and Justice O'Connor joined, in *Eichman*, where he noted that:

> it might be appropriate to defer to the judgment of the majority and apply the doctrine of *stare decisis* to the case at hand. That action, however, would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake. I remain persuaded that the considerations identified in my opinion in *Texas v. Johnson* are of controlling importance in this case as well.

496 U.S. at ——, 110 S.Ct. at 2412.

Petitioner submits that the sounder and more reasoned analysis of the question presented in this case is that expressed by the dissenters in both *Johnson* and *Eichman*. While defacing and mutilitating the United States flag may involve some form of expressive conduct, it is

clear that not every form of expression is protected by the First Amendment. *See*, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) [child pornography outside the scope of First Amendment]; *Miller v. California*, 413 U.S. 15 (1973) [obscene material unprotected by First Amendment]; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1969) [defamation not within scope of First Amendment]; *Brandenburg v. Ohio*, 395 U.S. 444 (1969) [speech likely to incite imminent lawless action not protected by First Amendment]; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) [no First Amendment protection for "fighting words"]. Petitioner submits that the minimal expressive conduct involved in the act of desecrating the American flag is insufficient to invoke the protection of the First Amendment.

Petitioner submits that the State of Texas has a legitimate interest in preserving the symbols of national and state unity, just as:

> the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients.

*Miller v. California*, 413 U.S. at 18-19. Petitioner submits that flag desecration represents that type of violent assault upon the deepest feelings and sensitivities of our citizens, especially those who have personally sacrificed to defend that very flag or those who have lost a loved one in its defense, sufficient to justify the protection of our national symbol of unity. As this Court recognized in *Spence v. State of Washington*, 418 U.S. 405, 413 (1974):

> For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and defend a Nation in which self-

> government and personal liberty endure. It evidences both the unity and diversity which are America.

Petitioner respectfully submits that the positions adopted by the four dissenters in *Johnson* and *Eichman* represent the correct analysis to be applied in this case. Accordingly, petitioner requests that a writ of certiorari be issued in this case and that this Court revisit the question presented in *Johnson* and *Eichman*.

## CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari to the Court of Appeals for the Eighth District of Texas.

Respectfully submitted,

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## APPENDIX

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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No. 08-91-00095-CR

THE STATE OF TEXAS,
*Appellant,*

v.

ROBERT LYNN JIMENEZ,
*Appellee.*

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Appeal from County Court at Law #2
of Midland County, Texas
(TC# 52,379)

---

OPINION

In this interlocutory appeal pursuant to Tex.Code Crim.Pro.Ann. art. 44.01(a)(1) (Vernon Supp. 1992), the State seeks review of the trial court's dismissal of an information against Robert Lynn Jimenez, Appellee. We affirm.

The information charged Appellee with unlawfully, intentionally and knowingly damaging, defacing and mutilating the flag of the United States of America. *See* Tex.Penal Code Ann. § 42.14 (Vernon Supp. 1992). Pursuant to his motion to dismiss the information, the trial court ruled that state statute prohibiting destruction of a flag unconstitutional. The ruling was based upon the United States Supreme Court's opinion which held a

similar federal statute, 18 U.S.C. § 700 (Supp. 1990), unconstitutional. *United States v. Eichman*, 496 U.S. ——, 110 L.Ed.2d 287, 110 S.Ct. —— (1990). Due to the supremacy of that ruling, the trial court was bound to follow the mandates of that case. Finding Section 42.14 of the Texas Penal Code similarly flawed, the trial court ruled it unconstitutional and dismissed the information. As a result, the State is entitled to and does appeal. *State v. Eaves*, 800 S.W.2d 220 (Tex.Crim.App. 1990).

The State argues that the strong presumption in favor of constitutionality of statutes was not rebutted by Appellee's argument and reliance upon *Eichman*. *See Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990, orig. proceeding). Furthermore, the State asserts the flag represents a symbol of national history and unity worthy of protection through the exercise of proper police power of the State. As such, the assailed statute is allegedly not impermissibly violative of an individual's freedom of free expression. Such arguments have been previously presented to the Supreme Court and rejected. *See Eichman*, 110 L.Ed.2d at 293-96; *Texas v. Johnson*, 491 U.S. 397, 105 L.Ed.2d 342, 358-63, 109 S.Ct. 2533 (1989).

Both rulings in *Eichman* and *Johnson* were predicated upon the finding that flag burning was expressive conduct containing ample elements of communication to involve the guaranteed protections provided by the First Amendment. *See Eichman*, 110 L.Ed.2d at 293-96; *Johnson*, 105 L.Ed.2d at 354. The State has not indicated how the present version of the Texas flag destruction statute differs from those previously ruled unconstitutional. The pertinent portion of the federal statute recently condemned provided that one who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States" is guilty of an offense. 18 U.S.C. § 700(a)(1)

(Supp. 1990). The current Texas statute delineates, in its pertinent part, that a person who "intentionally or knowingly damages, defaces, mutilates, or burns the flag of the United States or the State of Texas" commits an offense. Tex.Penal Code Ann. § 42.14(a). The controlling question is whether the current version is sufficiently distinct from the flawed statutes to the extent that it does, as opposed to its counterparts, constitutionally proscribe the judicially-appointed expressive conduct of desecration of a flag.

In *Eichman*, the government argued the new federal statute was constitutional because it was not fraught with the frailty of the prior Texas statute in that it did not target expressive conduct based upon the content of its message. The Texas statute ruled unconstitutional in *Johnson* prohibited acts of destruction that the actor knew would seriously offend onlookers. Similarly, a prior federal law proscribed only acts which would "cast contempt upon the flag." *See Eichman*, 110 L.Ed.2d at 294. However, Mr. Justice Brennan wrote that the absence of these explicit content-based limitations did not cure the infirmities. Consequently, as an intermediate appellate court, we must conclude that the present Texas statute cannot be found constitutional even though it also lacks such limitations.

Additionally, the State's reference to the legislature's overwhelming support for passage of Section 42.14 to illustrate the great value to be assessed for protection of symbols of national and state unity cannot be relied upon to find the current statute constitutional. Mr. Justice Brennan rejected the government's invitation to consider Congress's similar recognition of a national consensus favoring a prohibition against flag burning. Recognizing the potential offensiveness of desecration of a flag, the Court ruled that the government's role in creating and promoting national symbols did not properly include the criminal proscriptions embodied in the Flag Protection Act because such prohibitions served only to

"[dilute] the very freedom that makes [the Flag] so revered, and worth revering." *Eichman*, 110 L.Ed.2d at 296. Accordingly, we are constrained to also hold that similiar societal views within the state cannot, in and of themselves, justify the similar prohibitions found in Section 42.14 of the Texas Penal Code.

The Justices on this Court, like others across this country, have taken an oath to uphold the Constitution and laws of this State and of the United States. As an intermediate Court, we are bound to follow the decisions of all higher Courts in their interpretation of the laws and Constitution of this State and of the United States. Today we do that.

That does not prohibit the author of this opinion from expressing a view of approval of the dissenting opinion of Mr. Justice Stevens in both *Johnson*, 105 L.Ed.2d at 374 and *Eichman*, 110 L.Ed.2d at 297. Mr. Justice Brennan, the author of both opinions, and Mr. Justice Marshall, who joined with the majority in both 5 to 4 opinions, are no longer on the Court. When this issue reaches the Court again, it may apply the doctrine of *stare decisis* and deny an application for writ of certiorari. But, based on the conclusion of Mr. Justice Stevens's dissenting opinion in *Eichman*, it appears that he and those who joined with his dissent would prefer to change what they see as a bad national policy, initially created by a slim majority of the Court. If the Court does choose to grant a writ, this Court's decision to affirm the trial court's dismissal could be reversed.

But, for today, we are compelled to overrule the State's point of error, and the judgment of the trial court is affirmed.

/s/ Max N. Osborn
MAX N. OSBORN
Chief Justice

March 4, 1992

Before Panel No. 1
Osborn, C.J., Woodard and Koehler, JJ.

IN THE COUNTY COURT
OF MIDLAND COUNTY, TEXAS

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Cause No. 52,379

STATE OF TEXAS

vs.

ROBERT LYNN JIMENEZ

---

## ORDER DISMISSING INFORMATION

ON THE 15TH DAY OF MARCH, 1991, came on to be heard and considered the motion to dismiss the information herein filed by the defendant, Robert Lynn Jimenez. All parties appeared and, after careful consideration of the argument of counsel and the applicable law, the Court is of the opinion that the motion to dismiss should be granted as set forth below.

The Court notes that former Section 42.09, Texas Penal Code, insofar as such statute prohibited the desecration of the United States flag, was found unconstitutional by the Court of Criminal Appeals in *Johnson v. State*, 755 S.W.2d 92 (Tex.Crim.App. 1988), and by the United States Supreme Court in *Texas v. Johnson*, 109 S.Ct. 2533 (1989). The Court further notes that the Legislature enacted Section 42.14, Texas Penal Code, in response to *Johnson v. State* and *Texas v. Johnson*. The Court further notes that the defendant has been charged by information with a violation of Section 42.14 by allegedly damaging, defacing, and mutilating the flag of the United States. Accepting the facts alleged in such information and in the affidavit of probable cause as true for the purposes of this hearing, the Court finds, based upon

the holdings in *Texas v. Johnson supra*, and in *United States v. Eichman*, 110 S.Ct. 2404 (1990), that such conduct on the part of the defendant is protected under the First Amendment of the United States Constitution. The Court further finds that Section 42.14 of the Texas Penal Code is unconstitutional, as applied to the defendant, in light of *Texas v. Johnson* and *United States v. Eichman*.

IT IS THEREFORE ORDERED that the information filed against the defendant is hereby dismissed and it is further ordered and found by this Court that Section 42.14, Texas Penal Code, is unconstitutional, as applied to the defendant, as violative of the protections afforded by the First Amendment of the United States Constitution.

SIGNED this 25th day of March, 1991.

s James Fitz-Gerald
JAMES FITZ-GERALD
Judge Presiding

APPROVED AS TO FORM ONLY:

s Thomas Morgan
THOMAS MORGAN
Attorney for Defendant

s Mark H. Dettman
MARK H. DETTMAN
Midland County Attorney

OFFICIAL NOTICE June 18, 1992

COURT OF CRIMINAL APPEALS

COA # : 08-91-00095-CR

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RE: Case No. 0452-92

STYLE: STATE OF TEXAS v. JIMENEZ, ROBERT LYNN

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ORDER

THE STATE'S PETITION FOR DISCRETIONARY REVIEW IS REFUSED.

(FINAL RULING)

THOMAS LOWE
Clerk

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Texas Penal Code, Section 42.14:

(a) A person commits an offense if the person intentionally or knowingly damages, defaces, mutilates, or burns the flag of the United States or the State of Texas.

(b) In this section, "flag" means an emblem, banner, or other standard or a copy of an emblem, standard, or banner that is an official or commonly recognized depiction of the flag of the United States or of this state and is capable of being flown from a staff of any character or size. The term does not include a representation of a flag on a written or printed document, a periodical, stationery, a painting or photograph, or an article of clothing or jewelry.

(c) It is an exception to the application of this section that the act that would otherwise constitute an offense is done in conformity with statutes of the United States or of this state relating to the proper disposal of damaged flags.

(d) An offense under his section is a Class A misdemeanor.